ATTORNEY FOR APPELLANT:

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF	)	
	)	
JEANNINE R. ROWE, PERSONAL	)	
REPRESENTATIVE OF THE ESTATE OF	)	
KIANNA JAYNE KARNES f/k/a	)	
KIANNA KELLEY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A05-0606-CV-305
	)	
FRANK E. KELLEY,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUEPRIOR COURT
The Honorable Martha W. Rosenfeld, Master Commissioner
Cause No. 49D04-9012-DR-1850

January 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Jeannine R. Rowe ("Rowe"), personal representative of the estate of Kianna Jayne Kelley, appeals the trial court's order regarding jurisdiction and child support arrearage owed by Frank E. Kelley ("Father"). Rowe raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion by granting Father's Trial Rule 60(B)(8) motion and reducing his child support arrearage where Father did not appeal the arrearage as originally set by the trial court; and

II. Whether the trial court erred by holding that it no longer had jurisdiction over any issues related to the dissolution other than reducing Father's arrearage to judgment.

We affirm in part, reverse in part, and remand.

The relevant facts follow. Father filed a Verified Petition for Dissolution of Marriage in December 1990, naming Kianna Kelley ("Mother") as respondent. The Decree of Dissolution, granted in May of 1991, awarded care, custody, and control of the four minor children to Mother. The four children of the marriage were: J.K., born August 28, 1980; B.K., born December 27, 1982; A.K., born July 28, 1984; and D.K., born September 13, 1985. Paragraph four of the parties' Separation and Property Settlement Agreement, which the trial court incorporated by reference into the Decree of Dissolution, read as follows:

> 4. Child Support. Subject to the further order of the Court, Husband shall pay to Wife, as and for support of the minor children of the parties, the sum of $130.00 per week the first payment being due on the first day of the week following the effective date of this Agreement and subsequent payments being due on the first day of each week thereafter. Said payments for each child shall continue until said child shall become emancipated, married[,] or twenty-one (21) years of age.

Appellant's Appendix at 18.

On December 21, 1994, Mother filed a Verified Petition for Contempt Citation alleging that Father had failed to pay child support and was in arrears. The CCS indicates that Father failed to appear at the hearing held on January 20, 1995. The trial court found Father in contempt for failure to pay child support, and the arrearage was set at $24,700.00. The child support order was modified to $160.00 per week and an additional $40.00 per week toward the arrearage ($200.00 per week total).

The Marion County IV-D Prosecutor entered an appearance on Mother's behalf on May 5, 1995. In January 1997, Mother filed a petition to keep active a bench warrant on Father active and alleged that Father's arrearage was $43,500.00. On January 24, 1997, the trial court granted Mother's petition, setting Father's arrearage at $43,500.00. At a show-cause hearing held on January 26, 2005, the trial court set Father's arrearage at $61,851.38 and ordered Father to pay $160.00 per week in child support plus $76.00 per week toward the arrearage. Father attended the hearing and waived his right to counsel. Rowe, Mother's sister, and the Marion County IV-D Prosecutor's Office appeared on Mother's behalf. Father did not appeal the trial court's determination of the arrearage.

Mother died on March 24, 2005. On April 20, 2005, a compliance hearing was held, and Father's arrearage was set at $61,031.58 while his child support and arrearage payments remained unchanged. Again, Father did not appeal the trial court's order. On June 2, 2005, Rowe, as personal representative of Mother's estate, was substituted as a party in interest for Mother.

On July 12, 2005, Father filed a Verified Petition to Reduce Child Support Due to Emancipation of Minor Children, alleging that all the children were emancipated, and requesting that the trial court retroactively reduce his child support obligation back to the dates of emancipation of the children. In her Answer, Rowe indicated that D.K. "was not emancipated, having only graduated from high school in July, 2005, and was currently enrolled to begin classes at Lincoln Technical Institute beginning August 22, 2005." Appellant's Appendix at 84-85. Father also filed a Request to Terminate Income Withholding Order. In addition, Father filed a Trial Rule 60 Motion to Set Aside Order Setting Arrearage, which was established by the trial court on January 26, 2005 as $61,851.38. Father alleged that the arrearage was overstated by $16,405.10.

After a hearing, the trial court entered an order as follows:

IT IS THEREFORE ORDERED that:

1. [sic] this Court no longer has jurisdiction over any issues related to the dissolution other than reducing arrearage to judgment;

b. the total arrearage as of February 22, 2006 is $33,792.49 and is reduced the same to judgment;

c. the current income withholding order is terminated;

d. the Estate is required to repay all sums withheld from [Father's] checks after February 22, 2006; and

e. for all other just and proper relief in the premises.

Appellant's Appendix at 223.[1]

Initially, we must consider that Father has not filed an appellee's brief. "When an appellee does not submit a brief, an appellant may prevail by making a prima facie case of error." National Oil & Gas, Inc. v. Gingrich, 716 N.E.2d 491, 497 (Ind. Ct. App. 1999) (citing Rzeszutek v. Beck, 649 N.E.2d 673, 676 (Ind. Ct. App. 1995), trans. denied). In such a case, we need not undertake the burden of developing arguments for Father. See Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002).

I.

The first issue is whether the trial court abused its discretion by granting Father's Trial Rule 60(B)(8) motion and reducing Father's child support arrearage where Father did not appeal the arrearage as originally set by the trial court. "When a Trial Rule 60(B)(8) motion is filed, the burden is on the movant to demonstrate that relief is both necessary and just." Gipson v. Gipson, 644 N.E.2d 876, 877 (Ind. 1994). The grant or denial of a Trial Rule 60(B) motion is left to the "equitable discretion of the trial court, and is reviewable only for abuse of discretion." Id. "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, together with any reasonable inferences arising therefrom." Matter of Commitment of Pepper, 700 N.E.2d 253, 256 (Ind. Ct. App. 1998). We will not reweigh the evidence in conducting this review. Id.

[1] In an order dated January 23, 2006, the trial court scheduled an emancipation hearing for D.K., but a review of the record does not indicate that this hearing took place. In its March 10, 2006, order, the trial court did not include any findings with regard to emancipation of D.K.

Rowe argues that Father "used Indiana Trial Rule 60(B)[(8)] as a procedural vehicle to accomplish that which could have been accomplished on direct appeal. . . ." Appellant's Brief at 13. Ind. Trial Rule 60(B)(8) states in relevant part:

> (B) **Mistake—Excusable neglect—Newly discovered evidence—Fraud, etc.** On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
>
> * * * * *
>
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).
>
> The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.
>
> * * * * *

"Trial Rule 60(B)(8) allows a court to relieve a party from a final judgment for 'any other reason justifying relief from the operation of the judgment.'" Snider v. Gaddis, 413 N.E.2d 322, 324 (Ind. Ct. App. 1980).

> It is firmly established that a motion for relief from judgment under T.R. 60(B) may not be used as a substitute for a direct appeal based upon a timely motion to correct errors under Ind. Rules of Procedure, Trial Rule 59. The proper function of T.R. 60(B) is to afford relief from circumstances which could not have been discovered during the [thirty] day period in which a T.R. 59 motion to correct errors could have been filed with the trial court.

Id.

At a show cause hearing held on January 26, 2005, Father's arrearage was set at $61,851.58. Father appeared at this hearing and waived his right to counsel. Father did not appeal the trial court's determination of the arrearage amount. On April 20, 2005, the trial court held a compliance hearing, and Father's arrearage was set at $61,031.58. Again, Father did not appeal the trial court's order. Eight months later, on December 29, 2005, Father filed a Motion to Set Aside Order Setting Arrearage, pursuant to Trial Rule 60(B)(8), requesting that the trial court's order, setting Father's arrearage at $61,851.58, be set aside.

In his motion, Father's only stated ground for relief was mathematical error. The motion stated:

* * * * *

> 12. The Court's order should be amended to correct the mathematical error to state the actual amount of arrearage owed as of January 23, 2005.
>
> WHEREFORE, Petitioner Frank Kelley, by counsel, requests that the Court set aside its January 23, 2005 Order setting arrearage, to enter a new order setting the arrearage at $45,446.48 as of January 23, 2005 and for all other proper relief in the premises.

* * * * *

Appellant's Appendix at 141. Rowe argues that Father's "efforts to set aside the January 26, 2005, order are nothing more than an attempt to revive an expired appeal." Appellant's Brief at 13. We agree.

Father was present when the trial court set the $61,851.58 arrearage. He failed to dispute the amount as set by the trial court either by a Trial Rule 59 motion to correct

error or by a timely filed appeal. Instead, Father waited eight months to challenge the trial court's order based on an alleged mathematical error.

> Any matter which was known to or discoverable by a party within the period when a timely motion to correct errors could have been filed must be raised in a motion to correct errors under T.R. 59 and made the subject of a proper and timely appeal if appellate review is to be had. Any such issue[,] which was raised by, or could have been raised by a timely motion to correct errors and a timely direct appeal may not be the subject of a motion for relief from judgment under T.R. 60.

Mathis v. Morehouse, 433 N.E.2d 814, 816 (Ind. Ct. App. 1982) (emphasis added). If, in fact, there was a mathematical error, we find that it was known or discoverable by Father within the period that a timely motion to correct errors could have been raised or a timely appeal filed.

It is firmly established that Trial Rule 60(B) is not a substitute for a timely direct appeal, "based upon issues known or discoverable within the thirty days available to pursue an appeal." Sears Roebuck and Co. v. Noppert, 705 N.E.2d 1065, 1067 (Ind. Ct. App. 1999), trans. denied. "Relief is only properly provided under Rule 60(B) after a failure to perfect an appeal when there is some *additional fact* present justifying extraordinary relief which allows a court to invoke its equitable powers to do justice." Id. (citing William F. Harvey, 4 INDIANA PRACTICE 174 (1991)). Moreover, the motion cannot be used to revive an expired attempt to appeal. Father's remedy under the facts of this case was to file a motion to correct error or an appeal. He failed to do so. This court has recognized an "overriding policy that judgments must become final at a fixed, visible, and predictable point." Masterson v. State, 511 N.E.2d 499, 500 (Ind. Ct. App. 1987). Creating avenues of escape for litigants where there is no showing of exceptional

circumstances does not further this policy. A review of the record indicates that Father has made no showing of exceptional circumstances. Therefore, we find that the trial court abused its discretion by granting Father's motion to set aside judgment. See, e.g., id. (holding that T.R. 60(B) motion was inappropriate where the State failed to file a motion to correct error or a timely appeal).

II.

The next issue is whether the trial court erred by holding that it no longer had jurisdiction over any issues related to the dissolution other than reducing Father's arrearage to judgment. As a general rule, the trial court in a divorce action loses jurisdiction over the case upon the death of one of the principals. Johnson v. Johnson, 653 N.E.2d 512, 514 (Ind. Ct. App. 1995), reh'g denied. Indiana has recognized three narrow exceptions to this rule, which are: (1) to reduce a child support arrearage to judgment; (2) to allow a surviving spouse to modify a settlement agreement that was based on fraud by the deceased party; and (3) to allow the deceased party's attorney to recoup fees and expenses incurred in preparation of the case. Id.

In its order, the trial court in this case stated:

> IT IS THEREFORE ORDERED that:
>
> f. this Court no longer has jurisdiction over any issues related to the dissolution other than reducing arrearage to judgment;

Appellant's Appendix at 141. Rowe argues that it was error for the trial court "to establish an incorrect arrearage and then provide no means by which to collect on it by claiming lack of jurisdiction." Appellant's Brief at 18. Specifically, in her brief, Rowe

states: "if the trial court had jurisdiction for reducing the arrearage to judgment, it should retain jurisdiction to permit the collection of it." Id. Rowe relies on Lizak v. Schultz, 496 N.E.2d 40 (Ind. 1986). According to Rowe, "a close reading of Lizak suggests that the Indiana Supreme Court believed that the trial court retained jurisdiction to allow for collection of the arrearage after ruling that the Court had jurisdiction to reduce the arrearage to judgment." Appellant's Brief at 18. We think Rowe misinterprets the holding in Lizak.

In that case, the Indiana Supreme Court, agreeing with the Court of Appeals decision, held that "the dissolution court had the authority to reduce the back support to a judgment upon the substitution of the personal representative as claimant in [the decedent's] enforcement action." Lizak, 496 N.E.2d at 43. Here, the trial court had previously determined Father's arrearage. At the time of Mother's death, there remained an unpaid arrearage. "If there is an accrued but unpaid support obligation on the date of the custodial parent's death, it naturally flows that the divorce court retains the jurisdiction to reduce those obligations to a lump sum as of the date of the custodial parent's death." Lizak v. Schultz, 480 N.E.2d 962, 964 (Ind. Ct. App. 1985), incorporated by reference in Lizak, 496 N.E.2d 40 (Ind. 1986).

Rowe's argument that once the dissolution court reduces the arrearage to judgment it should retain jurisdiction to assure collection is unpersuasive. The fact that, upon the death of one of the parties, the dissolution court loses jurisdiction over the case does not cut off Rowe's ability, as Mother's personal representative, to recover the arrearage owed to Mother at the time of her death. Ind. Code § 29-1-13-3 (2004) provides:

> Every personal representative shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such personal representative, for any demand of whatever nature due the decedent or his estate or for the recovery of possession of any property of the estate or for the trespass or waste committed on the estate of the decedent in his lifetime, or while in the possession of the personal representative; but he shall not be liable, in his individual capacity, for any costs in such suit, and shall have power, at his option, to examine the opposite party under oath, touching such demand.

Ind. Code § 29-1-13-3 (2004). Further, Indiana Trial Rule 69(E) states:

> Notwithstanding any other statute to the contrary, proceedings supplemental to execution may be enforced by verified motion or with affidavits in the court where the judgment is rendered alleging generally:
>
> (1) that the plaintiff owns the described judgment against the defendant;
> (2) that the plaintiff has no cause to believe that levy of execution against the defendant will satisfy the judgment;
> (3) that the defendant be ordered to appear before the court to answer as to his non-exempt property subject to execution or proceedings supplemental to execution or to apply any such specified or unspecified property towards satisfaction of the judgment; and
> (4) if any person is named as garnishee, that garnishee has or will have specified or unspecified nonexempt property of, or an obligation owing to the judgment debtor subject to execution or proceedings supplemental to execution, and that the garnishee be ordered to appear and answer concerning the same or answer interrogatories submitted with the motion.
>
> If the court determines that the motion meets the foregoing requirements it shall, ex parte and without notice, order the judgment debtor, other named parties defendant and the garnishee to appear for a hearing thereon or to answer the interrogatories attached to the motion, or both.

* * * *

Ind. Trial Rule 69(E). Therefore, we cannot say that the trial court's holding that it no longer had jurisdiction over the dissolution action impedes Rowe's ability to collect the

judgment. The law provides other avenues through which she can proceed in order to collect the judgment from Father.

Rowe raises several issues in her brief which we will not discuss as they are not before us. However, we think that we must address the custody issue with regard to D.K. Rowe appears to argue that the dissolution court should not lose jurisdiction because of the one remaining unemancipated child, D.K. We disagree. "It has long been the law in this state that the trial court in a divorce action loses its jurisdiction of such case upon the demise of one of the principals." In re Marriage of Hilton, 459 N.E.2d 744, 744 (Ind. Ct. App. 1984). Therefore, because Mother died, the dissolution court has no further jurisdiction over the dissolution action after reducing the arrearage to judgment. The fact that there is a minor child remaining does not change that. The fact that the dissolution court no longer has jurisdiction does not preclude Rowe from proceeding on any remaining issues, including the custody of D.K. However, Rowe must bring any such actions before a court having proper jurisdiction. See, e.g., id. (holding that, where a dissolution court has lost jurisdiction, subsequent actions must be brought before the proper forum); See also Ind. Code § 29-3-3-6 (addressing guardianship of minor children following the death of a custodial parent).[2]

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[2] Rowe also requested that the dissolution court award interest on the arrearages owed by Father. The record does not indicate that this issue was ruled on by the dissolution court. Interest on child support orders is governed by Ind. Code § 31-16-12-2 (2004), which provides:

> The court may, upon a request by the person or agency entitled to receive child support payments, order interest charges of not more than one and one-half percent (1 1/2%) per month to be paid on any delinquent child support payment. The person or agency may apply for interest if support payments are not made in accordance with the support order.

For the foregoing reasons, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

CRONE, J. concurs

SULLIVAN, J. concurs in result

> Accrued interest charges may be collected in the same manner as support payments under IC 31-16-9.

See, e.g., Caldwell v. Black, 727 N.E.2d 1097, 1099 (Ind. Ct. App. 2000) (holding that parent could obtain interest under the Interest on Delinquent Child Support Statute if specifically requested); In re Marriage of Johnson, 625 N.E.2d 1331, 1333 (Ind. Ct. App. 1993) (holding that "[u]pon a request, the trial court 'may' award interest"). Rowe requested interest on the child support owed by Father. Therefore, the dissolution court should address this on remand.